

**JUDICIAL COUNCIL OF THE
TENTH CIRCUIT**

IN RE: COMPLAINT UNDER THE
JUDICIAL CONDUCT AND
DISABILITY ACT

Nos. 10-13-90020 through 10-13-90026

Before **BRISCOE**, Chief Judge.

ORDER

Complainant has filed a complaint of judicial misconduct against seven circuit judges in this circuit. My consideration of this complaint is governed by 1) the misconduct rules issued by the Judicial Conference of the United States, entitled *Rules for Judicial-Conduct and Judicial-Disability Proceedings* (the “Misconduct Rules”); 2) the federal statute dealing with judicial misconduct, 28 U.S.C. § 351 *et seq.*, and 3) the “Breyer Report,” a study by the Judicial Conduct and Disability Act Study Committee, headed by Supreme Court Justice Stephen Breyer, entitled *Implementation of the Judicial Conduct and Disability Act of 1980*. The Breyer Report may be found at: <http://www.supremecourt.gov/publicinfo/breyercommitteereport.pdf>. To the extent that there are any relevant prior decisions of the full Judicial Council of this circuit which are consistent with those authorities, they may also govern my consideration of this complaint.

Complainant has been provided with a copy of the Misconduct Rules, and the Rules are also accessible on the Tenth Circuit’s web page at:

<http://www.ca10.uscourts.gov/misconduct.php>. In accord with those rules, the names of the complainant and subject judges shall not be disclosed in this order. *See* Misconduct Rule 11(g)(2).

Complainant sets out a long history of litigation involving a public utility, including state condemnation actions and four separate federal law suits and appeals decided by panels comprised of the subject circuit judges. Complainant contends that the appellate decisions made by the subject judges favored the public utility and were decided in violation of applicable state law. The history includes a description of a meeting where counsel for the public utility in the federal actions suddenly appeared and participated as counsel in the state condemnation actions and reversed course by providing discovery in the state actions that the public utility had been fighting for years. Complainant contends that “the only possible and obvious explanation” is that counsel had entered into an *ex parte* conspiracy with the Tenth Circuit whereby the court would rule in the public utility’s favor. Complainant also alleges the conspiracy as a predicate act for a RICO claim against the public utility. Complainant contends that such a conspiracy would violate the law and constitute misconduct.

First, I note that one of the judges named in this complaint is no longer a judge of the court, having retired. These procedures apply only to federal judges, *see* Misconduct Rule 4, and therefore the complaint cannot proceed against that judge.

To the extent that complainant's history and critical comments about the appellate opinions seek to challenge those decisions, the allegations of the complaint are not cognizable as misconduct because they are "directly related to the merits of a decision or procedural ruling." Misconduct Rule 11(c)(1)(B). As explained in the Breyer Report, this exclusion of matters related to the merits of underlying cases protects the independence of the judges deciding those cases. *See* Breyer Report, App. E., ¶ 2.

While allegations of *ex parte* communication and conspiracy may state valid claims for misconduct, these claims fail because they are unsupported. The Misconduct Rules require complainants to support their allegations with "sufficient evidence to raise an inference that misconduct has occurred." *See* Misconduct Rule 11(c)(1)(D). Complainant's conclusory theory that the judges' rulings in four separate appeals and counsel's production of discovery could only be based on a conspiracy entered into through *ex parte* communications does not provide a reasonable basis on which an inference of misconduct can be based.

In light of this conclusion, I also deny complainant's request that this misconduct complaint be transferred to another circuit. Misconduct Rule 26 provides that transfers may be made in "exceptional circumstances." Complainant does not say why such circumstances exist here, and I find no support for that standard in the complaint.

Accordingly, this complaint is dismissed pursuant to Misconduct Rule 11(c). The Circuit Executive is directed to transmit this order to complainant and copies to the subject judges and the Judicial Conference Committee on Judicial Conduct and Disability. *See* Misconduct Rule 11(g)(2). To seek review of this order, complainant must file a petition for review by the Judicial Council. The requirements for filing a petition for review are set out in Misconduct Rule 18(b). The petition must be filed with the Office of the Circuit Executive within 35 days of the date of the letter transmitting this order. *Id.*

So ordered this 12th day of April, 2013.

/s/ Mary Beck Briscoe

Honorable Mary Beck Briscoe
Chief Circuit Judge